Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

SHERI L. BROWN,

Petitioner,

v.

PIZZA HUT OF AMERICA, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 *et seq.*, (FLSA) mandates the award of appeal related attorney fees where the express language of Section 216(b) of the FLSA provides, in pertinent part, that "[T]he court in such action *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action" *and* where Petitioner was awarded judgment and attorney fees in the trial court proceedings?

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The June 26, 1997 order of the United States Court of Appeals for the Tenth Circuit finding the existence of a split of authority on the issue of whether to award appeal-related attorney's fees in a Fair Labor Standards Act (FLSA) case and holding that such an award is within the court's discretion is unpublished and is reprinted in the Appendix to this Petition at A1-A2. No petition for rehearing was filed from that order.

The May 22, 1997 opinion of the United States Court of Appeals for the Tenth Circuit affirming the decision of the district court is unpublished at 113 F.3d 1245 (Table) (10th Cir. 1997) and is reprinted in the Appendix to this Petition at B1-B6. No petition for rehearing was filed from that order.

The January 27, 1997 order of the United States District Court for the Western District of Oklahoma in Case Number Civ-95-1293-C awarding Petitioner an attorney fee in the sum of $24,387 for the successful prosecution of Petitioner's FLSA claims in accordance with § 216 of the FLSA is reprinted in the Appendix to this Petition at C1-C2. Neither Petitioner nor Respondent appealed this order.

The June 20, 1996 judgment and memorandum opinion of the United States District Court for the Western District of Oklahoma in Case Number Civ-95-1293-C wherein liquidated damages were assessed by the Court on the jury award is reprinted in the Appendix to this Petition at D1-D5.

The May 17, 1996 jury verdict is reprinted in the Appendix to this Petition at E1-E2.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Tenth Circuit was filed on June 26, 1997. This Court has jurisdiction to review the order of the court of appeals pursuant to 28 U.S.C.A. § 1254(1) (1997).

STATUTORY PROVISIONS INVOLVED

The full texts of U.S.C.A. tit. 29, § 207(a) (West 1965 & Supp. 1997), U.S.C.A. tit. 29, § 215(a)(3) (West 1965 & Supp. 1997), U.S.C.A. tit. 29, § 216(b) (West 1965 & Supp. 1997), and U.S.C.A. tit. 29, § 260 (West 1965 & Supp. 1997) are reprinted in the Appendix to this Petition at F1-F4.

STATEMENT OF THE CASE

Procedurally, this case comes before the Court following the June 26, 1997 denial by the Tenth Circuit Court of Appeals of Petitioner Sheri L. Brown's claim for attorney's fees under the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 216(b), for representation in the appellate proceedings initiated by Respondent Pizza Hut of America, Inc. and the cross appeal filed by Petitioner. Appendix to Petition at A1-A2; Appendix to Petition at B1-B6.

On May 22, 1997 the United States Court of Appeals for the Tenth Circuit affirmed the district court's award of

liquidated damages under 29 U.S.C.A. § 216(b) and 215(a)(3). Appendix to this Petition at B1-B6. The district court's June 20, 1996 memorandum opinion and judgment assessed liquidated damages in the sum of $34,394.17 on Petitioner's retaliation claim and in the sum of $2,500.00 on Petitioner's claim for unpaid overtime compensation. The judgment against Respondent in the amount of $89,394.17 was affirmed by the Tenth Circuit. Appendix to this Petition at D1-D2. Respondent's notice of appeal was filed on July 7, 1996 and the issue on appeal was: [W]hether the trial court committed error by awarding liquidated damages equal to the award of back pay on Petitioner's FLSA retaliation claim under 29 U.S.C.A. § 216(b) and § 215(a)(3)? Petitioner's notice of (cross) appeal was filed on July 22, 1996 and the issue on appeal was: [W]hether the district court abused its discretion by failing to award statutorily mandated liquidated damages under § 215(a)(3) and § 216(b) of the FLSA based upon Pizza Hut's failure to meet its statutory burden of proof for relief from liquidated damages set forth in § 260 of the FLSA; and whether the case should be remanded to the district court with instructions for the Court to enter an order awarding liquidated damages on the jury's verdict awarding Brown compensatory damages in the amount of $15,605.83 for Pizza's Hut's discrimination and retaliation in violation of § 215(a)(3) and § 216(b) of the Fair Labor Standards Act?

Subsequent to the Tenth Circuit's May 20, 1997 order affirming the district court's decision, Petitioner filed an application for attorney fees in accordance with 29 U.S.C.A. § 216(b) of the FLSA. On May 22, 1997, the Tenth Circuit denied the application and found:

> Whether to award appeal-related attorney's fees in a Federal (sic) Labor Standards Act (FLSA) case is within the court's discretion. *See International Assoc. of Fire Fighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814 , 821 (10th Cir. 1989). We had not previously interpreted the language of the second sentence of 29 U.S.C. § 216(b), and found a split among the courts that have. Therefore, although defendant-appellant did not prevail on its issue on appeal, the appeal was reasonable. Plaintiff-appellee did not prevail on her cross appeal. On balance, then, we do not believe an award of attorney's fees is warranted. *Cf. id.* at 822 (denying award of attorney's fees to prevailing party in reasonable appeal in FLSA case). Plaintiff-appellee's request for attorney's fees and motion to remand to district court is DENIED. Appendix to Petition A1-A2 (June 26, 1997 Order).

In its order, the Tenth Circuit exercised unauthorized discretion because the express statutory language of the FLSA only provides for discretion to be exercised on the issue of determining a "reasonable" attorney's fee in addition to the judgment affirmed by the Tenth Circuit. The clear and express language of § 216(b) of the FLSA permit Petitioner to recover attorney fees reasonably incurred in defending Respondent's appeal and to maintain her cross-appeal prior to the Tenth Circuit's disposition of Petitioner's application for attorney fees under the FLSA.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE DIRECT AND IRRECONCILABLE CONFLICT BETWEEN THE CIRCUITS REGARDING THE ISSUE OF WHETHER APPEAL RELATED ATTORNEY'S FEES ARE MANDATORY OR DISCRETIONARY UNDER SECTION 216(b) OF THE FLSA

This Court grants writs of certiorari in cases involving the FLSA when there is an asserted conflict between circuits. *Mitchell v. H.B. Zachry Co.*, 362 U.S. 310, 313, 80 S.Ct. 739, 742, 4 L.Ed.2d 753 (1960) (certiorari was granted to resolve a conflict between the Tenth Circuit and the Eighth Circuit on the scope of the FLSA).

In *Idaho Sheet Metal Works, Inc. v. Writz*, 383 U.S. 190, 195, 86 S.Ct. 737, 742, 15 L.Ed.2d 694 (1966), this Court granted certiorari to resolve conflicting decisions of the Ninth Circuit and the Sixth Circuit Courts of Appeals on the issue of whether employers were retail or service establishments within the statutory exemptions under the FLSA. This Court reasoned that the conflicting opinions represented irreconcilable interpretations of critical statutory language contained in FLSA.

In this case, a conflict has developed in the circuit courts of appeals regarding whether § 216(b) of the FLSA mandates appeal related attorney fees. This issue should be resolved by this Court because the remedial provisions of § 216(b) apply not only to actions under the FLSA, but actions under the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 623-626(b) and the Equal Pay Act, 29 U.S.C.A. § 206(d)(1) – federal statutory provisions

enacted to promote the public policy of protecting covered employees from impermissible employment practices.

A. Circuit Courts of Appeals Holding Appeal Related Attorney Fees are Mandated by Section 216(b) of the FLSA

The Fourth, Sixth, Seventh and Ninth Circuits have held that the express language of § 216(b) directs the award of attorney's fees for appellate proceedings.

In *Maddrix v. Dize,* 153 F.2d 274, 275-277 (4th Cir. 1946) the court held that attorney's fees for appeal to the circuit court and to the United States Supreme Court were mandated by § 216(b) because nothing in the FLSA limits attorney's fees to district court proceedings and Congress intended that the wronged employee should receive her full wages plus the penalty without incurring any expense for legal fees or costs.

Similarly, in *Fegley v. Higgins,* 19 F.3d 1126, 1134-1135 (6th Cir. 1994) the court held that attorney's fees under § 216(b) are mandatory and distinguished the mandatory fee provision of 29 U.S.C. § 216(b) from the discretionary fee provision of 42 U.S.C. § 1988. The Court also found that Fegley's attorney had expended additional effort upon the appeal and remanded the case to the district court to determine whether to increase the previous award of attorney fees.

In *Soto v. Adams Elevator Equipment Co.,* 941 F.2d 543, 551-554 (7th Cir. 1991) the Seventh Circuit Court of

Appeals affirmed the district court's award of an attorney's fee under § 216(b) in an action under the Equal Pay Act and directed Soto to submit a statement for the fees reasonably incurred to defend against Adams' appeal and to maintain a cross-appeal. The *Soto* Court cited *Ustrak v. Fairman*, 851 F.2d 983, 990 (7th Cir. 1988) and reasoned that when the defendant appeals and the plaintiff incurs expenses in defending against the appeal that are reasonable even though they are not crowned by complete success, ordinarily he should be entitled to reimbursement of those fees because he had no choice but to incur them or forfeit his victory in the district court.

Also, in *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1072 (9th Cir. 1990) *cert. den.*, 498 U.S. 1086, 111 S.Ct. 962, 112 L.Ed.2d 1049 (1990) the Ninth Circuit Court of Appeals held that employees were entitled to reasonable attorney fees incurred to defend against the County's cross-appeal in accordance with *Newhouse v. Robert's Ilima Tours, Inc.*, 708 F.2d 436, 441 (9th Cir. 1983) and 29 U.S.C. § 216(b). The court further held that the employees were not entitled to fees incurred pursuant to their own appeal because they did not prevail on their appeal.

The award of attorney fees under § 216(b) encourages the vindication of congressionally identified policies and rights. *Fegley*, 19 F.3d at 1135 (citation omitted). Section 216(b) of the FLSA expressly provides that a court shall allow a reasonable attorney's fee to be paid by the defendant and that the costs of the action shall be paid by the defendant. An **award of attorney fees** to the prevailing plaintiff under § 216(b) of the FLSA is **mandatory**, but the **amount of the award is within the discretion of the judge**. *Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994)

cert. den., 115 S.Ct. 203 *citing United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Ass'n, Local 307 v. G & M Roofing and Sheet Metal Co.*, 732 F.2d 495, 501 (6th Cir. 1984) (emphasis added).

> Since the FLSA does not discuss what constitutes a reasonable fee, '[t]he determination of a reasonable fee must be reached through an evaluation of a myriad of factors, all within the knowledge of the trial court, examined in light of the congressional policy underlying the substantive portions of the statute providing for the award of fees.' *Fegley*, 19 F.3d at 1134.

In *Fegley*, the Sixth Circuit addressed the issue of whether the lower court abused its discretion by awarding an unreasonable fee and held that:

> "[T]he purpose of the FLSA attorney fees provision is 'to insure effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances'." *Fegley*, at 1134 (citation omitted). Courts should not place an undue emphasis on the amount of the plaintiff's recovery because an award of attorney fees here "encourage[s] the vindication of congressionally identified policies and rights." *Fegley*, at 1134-35 (citation omitted).

The Sixth Circuit noted that, " . . . we have upheld substantial awards of attorney's fees even though a plaintiff recovered only nominal damages." *Fegley* at 1135. The Court also recognized that the express language of the FLSA separates the award of attorney fees and costs of the action. In contrast to the FLSA, 42 U.S.C.A. § 1988 provides that the court in its discretion may allow the prevailing party a reasonable attorney's fee **as part of the**

costs. *Fegley,* at 1135 (emphasis in original). The FLSA is therefore distinguishable from the Civil Rights Act of 1964, as amended, and Title VII. Attorney fees under 42 U.S.C.A. § 1988 and 42 U.S.C.A. § 2000e-5 are discretionary under the express terms of the statutory language. Congressional intention to leave the issue of attorney fees to the court's discretion is manifested by the statutory language providing that the court in its discretion may allow the prevailing party a reasonable attorney's fee and expert fees as part of the costs. *See* 42 U.S.C.A. § 1988 (1997); *see also* 42 U.S.C.A. § 2000e-5 (1997).

The FLSA requires that the mandatory award of attorney's fees be reasonable and fees reasonably incurred in defending against the employer's appeal are recoverable. *Soto, supra* at 551-554; *see Ustrak, supra* at 990. When it is evident that almost all of the attorney's time is spent in defending the appeal on those issues on which the employee prevailed although a cross-appeal is partially successful or unsuccessful, the total number of hours expended on appeal may merely be reduced by any hours expended on unsuccessful issues. *Soto, supra* at 551-554. *See Bratt, supra* at 1072 (held employees were entitled to receive reasonable attorneys' fees incurred to defend against the employer's cross-appeal however the employees were not entitled to fees incurred on their own appeal because they did not prevail on their own appeal). As Circuit Judge Posner reasoned in *Ustrak*:

> But when the defendant appeals and the plaintiff incurs expenses in defending against the appeal that are reasonable even though they are not crowned by complete success, ordinarily he should be entitled to reimbursement of those

> fees; *he had no choice but to incur them or forfeit his victory in the district court. Ustrak v. Fairman*, 851 F.2d 983, 990 (7th Cir. 1988) (emphasis added).

In *Perkins v. Standard Oil Co.*, 399 U.S. 222, 90 S.Ct. 1889, 26 L.Ed.2d 534 (1970), this Court held that attorney fees for appellate stages of a successfully prosecuted private antitrust action were mandated by the language of 15 U.S.C.A. § 15 (Clayton Act) providing, in pertinent part, that: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." This Court held in *Perkins* that the district court erred in holding that Section 15 does not authorize the award of counsel fees for legal services performed in the appellate stages of a successfully prosecuted private antitrust action because both the language and the purpose of Section 15 make that construction untenable. *Perkins*, 90 S.Ct. at 1989-1990. Moreover, this Court found in *Perkins* that the appellate court was also in error in interpreting the Supreme Court's mandate as precluding the award of such fees for services performed in connection with the litigation to the Supreme Court. The *Perkins* Court granted petitions for certiorari and vacated the judgments entered by district and appellate courts and remanded the cases to the district court and to the court of appeals for further proceedings consistent with the opinion.

In sum, the above authorities clearly show that the FSLA grants prevailing plaintiffs a reasonable attorney

fee. Such awards include fees for appellate and post remand services.

B. Circuit Courts of Appeals Holding that an Award of Appeal Related Attorney Fees Pursuant to Section 216(b) of the FLSA is Discretionary

Contrary to the decisions of the Fourth, Sixth, Seventh and Ninth Circuits set forth above, the Fifth, Eighth, Tenth and Eleventh Circuits have determined that if an FLSA case is appealed, the appellate court has discretion on whether to award attorney's fees for representation on the appeal.

The Fifth Circuit held in *Montalvo v. Tower Life Building*, 426 F.2d 1135, 1150 (5th Cir. 1970) that an additional attorney fee to compensate counsel for their services in connection with the appeal can be awarded in a FLSA case when the appellate court considers such an award appropriate. The Fifth Circuit's holding in *Montalvo* is relied upon by the Eleventh Circuit in *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1553 (11th Cir. 1984); the Tenth Circuit in *International Assoc. of Fire Fighters, Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814 (1989) (hereinafter "Local 2203"); and the Eighth Circuit in *Cleverly v. Western Electric Co.*, 594 F.2d 638 (8th Cir. 1979).

In *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1553 (11th Cir. 1984) the court cited *Montalvo*, 426 F.2d at 1150 (5th Cir. 1970) and held that appellate attorney's fees may be awarded pursuant to the remedial provisions of the FLSA that Congress incorporated in the ADEA when the appellate court considers such an award

appropriate and remanded the case to the district court for the assessment of the amount of attorney's fees to be awarded to O'Donnell for the appeal.

The Eighth Circuit interpreted § 216(b) as allowing an award of fees to compensate a prevailing plaintiff's counsel for services in connection with an appeal as within the discretion of the appellate court and found that the plaintiff was entitled to recover attorney's fee for the appellate phase of the case. *Cleverly v. Western Electric Co.*, 594 F.2d 638 (8th Cir. 1979) citing *Montalvo v. Tower Life Building*, 426 F.2d 1135, 1150 (5th Cir. 1970).

In *International Assoc. of Fire Fighters, Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814 (1989), the court held that if an FLSA case is appealed, the appellate court has discretion to award attorney's fees expended on appeal. The Tenth Circuit, relying on *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1557 (10th Cir. 1988), *Montalvo v. Tower Life Building*, 426 F.2d 1135, 1150 (5th Cir. 1970), and *Handler v. Thrasher*, 191 F.2d 120, 123 (10th Cir. 1951), found that the appeal was reasonable and declined to award attorney's fees for time expended on appeal. *Local 2203*, 877 F.2d at 821. The appellate court found that this Court's holding in *Hecht Co. v. Bowles*, 821 U.S. 321, 328, 64 S.Ct. 587, 591, 88 L.Ed. 754 (1944) was analogous to an FLSA case and cited *Hecht* for the proposition that an Emergency Price Control Act of 1942 case, stating that based on the legislative history of the act, the phrase " 'shall be granted' is less mandatory than a literal reading might suggest." The issue before the Court in *Hecht* involved the equitable relief of an injunction provided by statute and courts of equity have sound discretion as a guide to determinations of whether injunctions

should issue. However, under § 216(b) of the FLSA, courts are without statutory discretion over whether attorney fees are recoverable.

The remedial provisions of § 216(b) expressly apply to § 206, § 207 and § 215(a)(3) and mandate that the court shall, in addition to any judgment awarded to an employee, allow a reasonable attorney's fee to be paid by the employer. Attorney's fees are mandated; however, the amount should be reasonable. Reasonable attorney fees are separate and distinct from the costs recoverable under § 216(b). The clear statutory language mandates the award of attorney fees to a prevailing plaintiff; however, the court's exercise of discretion is limited to the amount of attorney fees that are reasonable under the circumstances.

CONCLUSION

In view of the split of authority among the circuit courts of appeals concerning whether the award of appeal related attorney fees is mandated by § 216(b) of the FLSA, this Court should grant Petitioner's writ of certiorari to resolve the direct and irreconcilable conflict among the circuits *and* to foster the congressional intent of vindicating the protection of employee rights enumerated under the federal statutory scheme provided by the FLSA. A primary purpose of certiorari jurisdiction is to bring about uniformity of decisions on matters of federal substantive law among the federal courts of appeals.

In denying Petitioner's first impression request for appeal related attorney fees, the Tenth Circuit Court of

Appeals recognized the conflict among the circuit courts of appeals that have considered this issue. There exists an equal split among the eight circuit courts of appeals that have considered this issue. Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit and resolve the existing conflict.

Respectfully submitted,

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APPENDIX A

FOR THE TENTH CIRCUIT

SHERI L. BROWN, Plaintiff-Appellee-Cross-Appellant, v. PIZZA HUT OF AMERICA INCORPORATED, Delaware corporation, Defendant-Appellant-Cross-Appellee.	)	Nos. 96-6244 & 96-6260

ORDER
Filed June 26, 1997

Before BRORBY, BARRETT, and LUCERO, Circuit Judges.

We have before us plaintiff-appellee's "Application for Attorney Fees, Costs and Expenses and Motion for Remand to District Court to Determine Amount," and "Application to Tax Costs on Appeal and Application for Leave to Supplement." We construe plaintiff-appellee's application for fees, costs, and expenses as a timely cost bill. We GRANT her application for leave to supplement.

Whether to award appeal-related attorney's fees in a Federal Labor Standards Act (FLSA) case is within the

court's discretion. *See International Ass'n of Fire Fighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814, 821 (10th Cir. 1989). We had not previously interpreted the language of the second sentence of 29 U.S.C. § 216(b), and found a split among the courts that have. Therefore, although defendant-appellant did not prevail on its issue on appeal, the appeal was reasonable. Plaintiff-appellee did not prevail on her cross-appeal. On balance, then, we do not believe an award of attorney's fees is warranted. *Cf. id.* at 822 (denying award of attorney's fees to prevailing party in reasonable appeal in FLSA case). Plaintiff-appellee's request for attorney's fees and motion to remand to district court is DENIED.

Plaintiff-appellee's request for costs in the amount of $289.17 for copies of the brief and appendix is GRANTED. The cost of a trial transcript is not taxable in this court. *See* Fed. R. App. P. 39(e). We note, moreover, that except for the verdict form and the jury instruction on damages, the trial transcript was not necessary to the appeal.

Entered for the Court
PATRICK FISHER, Clerk
By /s/ Opal A. Carter
Deputy Clerk

APPENDIX B

113 F.3d 1245 (Table)
133 Lab.Cas. P 33,533, 97 CJ C.A.R. 780
Unpublished Disposition
(Cite as: 113 F.3d 1245, 1997 WL 271313 (10th Cir. (Okla.)))

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Sheri L. BROWN, Plaintiff-Appellee Cross-Appellant,

v.

PIZZA HUT OF AMERICA INCORPORATED, Delaware corporation, Defendant-Appellant-Cross-Appellee.

Nos. 96-6260, 96-6244.

United States Court of Appeals, Tenth Circuit.

May 22, 1997.

Before BRORBY, BARRETT, and LUCERO, Circuit Judges.

ORDER AND JUDGMENT*

**1 Plaintiff, a former Pizza Hut restaurant manager, prevailed at trial on her claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, that she was constructively discharged by defendant Pizza Hut in retaliation for complaining about its break policy and nonpayment of overtime compensation. The jury awarded Brown $2,500.00 in unpaid overtime; $34,394.17 in back pay; and a lump sum of $15,605.83 in compensatory damages. Under the jury instruction and verdict form, the compensatory damage award may have included front pay as well as damages for other, non-pecuniary losses. *See* Appellant's App. at 40-41, 50. At Brown's request, the district court awarded her an additional amount as liquidated damages equal to the jury's unpaid overtime and back pay awards under 29 U.S.C. § 216(b).

On appeal, Pizza Hut contends that the district court erred in doubling the back pay award on Brown's retaliation claim. Pizza Hut argues that the liquidated damages award improperly duplicates damages provided by the jury in its compensatory damages award. Brown contends on cross-appeal that the district court was required by the statute to double the jury's compensatory damages award

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* At the parties' request, the case is unanimously ordered submitted without oral argument pursuant to the applicable rules. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

as well as the back pay and overtime awards. We exercise jurisdiction under 28 U.S.C. § 1291, and affirm.

The parties do not agree on the appropriate standard of review. Pizza Hut argues that we should review the district court's interpretation of the statute de novo, while Brown argues that we should review the district court's award of liquidated damages only for abuse of discretion. We see no inconsistency in these contentions. Pizza Hut's claim that the district court wrongly interpreted 29 U.S.C. § 216(b) raises a legal issue that we review de novo. *See Burlington N.R.R. v. Huddleston*, 94 F.3d 1413, 1416 (10th Cir.1996). To the extent a proper interpretation of the statute gives the district court discretion, however, we review its action under the statute only for abuse of discretion. *See Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1351 (10th Cir.1986). With these standards in mind, we turn to the merits.

The liquidated damages award provided in the first sentence of § 216(b)[1] – for violations of the FLSA's minimum wage and overtime compensation provisions – is

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[1] The first two sentences of 29 U.S.C. § 216(b) state:

Any employer who violates the provisions of section 206 [minimum wages] or section 207 [overtime compensation] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) [retaliatory discharge] of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

intended to compensate the plaintiff for "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942). The statutory language gives us no reason to conclude that the award of liquidated damages provided in the second sentence of § 216(b) – for violations of the FLSA's retaliation provision – is intended to serve a different purpose.

Whether the provision for an award of liquidated damages in retaliation cases is discretionary or mandatory is a separate question. Although we have held that the award of liquidated damages in wage and overtime cases provided in the first sentence of § 216(b) is mandatory unless the district court finds that the employer acted reasonably and in good faith, as provided in 29 U.S.C. § 260, *see, e.g. Crenshaw*, 798 F.2d at 1351 (case involving overtime provision of FLSA); *Doty v. Elias*, 733 F.2d 720, 725-26 (10th Cir.1984) (case involving minimum wage provision of FLSA), we have not yet had occasion to consider whether the liquidated damages award provided in the second sentence of the statute – for violations of the FLSA's retaliatory conduct provision – is mandatory or discretionary. *Compare Blanton v. City of Murfreesboro*, 856 F.2d 731, 737 (6th Cir.1988), and *York v. City of Wichita Falls*, 763 F.Supp. 876, 880 (N.D.Tex.1990), and *Professional Firefighters Ass'n v. City of Clayton*, 759 F.Supp. 1408, 1413-14 (E.D.Mo.1991), with *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1226, 1232 (7th Cir.1995), and *Lowe v. Southmark Corp.*, 998 F.2d 335, 337 (5th Cir.1993). We need not determine this issue today. Whether mandatory or discretionary, the plain language of the second sentence of § 216(b) clearly implies that

only "wages lost" are subject to doubling in a retaliation case. If the award of liquidated damages on Brown's back pay award (which obviously represents lost wages) is mandated by § 216(b), then Pizza Hut cannot show that the district court erred in making the award.

**2 Even if the award is discretionary, the only compensatory damages that could arguably be improperly duplicated by the liquidated damages award on back pay are those awarded for nonpecuniary losses, and Pizza Hut cannot show what portion of Brown's lump-sum compensatory damages award represents nonpecuniary losses. According to the jury instruction and the verdict form, Brown's compensatory damages award might include front pay and/or compensation for "future losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life." Appellant's App. at 40, 50. Pizza Hut has not in any way indicated that it objected in the district court to both pecuniary and nonpecuniary damages being combined on the verdict form and, accordingly, it has waived any objection to the district court's treatment of this award. *Cf. Patton v. TIC United Corp.*, 77 F.3d 1235, 1241 (10th Cir.), *cert. denied*, 116 S.Ct. 2525 (1996); *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1337 (10th Cir.1984); *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir.1977).

By the same token, Brown cannot prevail on her cross-appeal that § 216(b) mandates that her compensatory damages award be doubled. Although front pay at least arguably constitutes lost wages, Brown cannot show what portion of her lump-sum compensatory damages award represents front pay. There is no indication in the

record that Brown objected to both pecuniary and non-pecuniary damages being combined on the verdict form and, as a result, she cannot show that the district court erred in declining to double her compensatory damages award.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SHERI L. BROWN, Plaintiff	)	No. CIV-95-1293-C
vs.	)	(Filed Jan 27 1997)
PIZZA HUT OF AMERICA, INC., Defendant	)	

ORDER

On October 15, 1996, the Court entered an Order directing plaintiff's counsel to resubmit her attorney fee request to comply with certain instructions. The request has now been resubmitted, with a reduction of certain specific entries, and an explanation of others. Defendant has again objected to the amount sought. The October 15 Order contained the Court's direction that counsel revise her request to separate her time for the successful FLSA claims from all other work performed on the case. The Court warned counsel that if she were unable to adequately separate her time, the Court would "simply reduce the award to account for the limited success." Order at 3, citing *Hensley v. Eckerhart*, 461 U.S. 424, 426-27 (1984). Counsel's revised submission, in addition to making relatively minor reductions directed in the October 15 Order, maintains that only 14.8 of her originally claimed 350 hours were attributable to the non-FLSA claims. As stated in the October 15 Order, it is apparent from the motions, evidence, and trial testimony that the FLSA

claims were entirely separate and apart from the losing claims and were, in fact, relatively minor. This is not the case which justifies a fee award on *all* hours because the winning and non-winning claims are interrelated. The FLSA was a small part of pretrial preparation and trial time, and, based either on adequate records or common sense and experience, counsel should be able to distinguish hours spent. Because counsel is unwilling or unable to distinguish between time spent on prevailing and non-prevailing claims, the Court will reduce the claimed fee by half, that being a generous estimate of the preparation and trial time devoted to the FLSA claims.

Counsel have agreed and the Court finds $150 an hour to be a reasonable hourly rate for plaintiff's counsel. The Court finds 162.58 hours to be the reasonable time spent in prosecution of the FLSA, as distinguished from all other, claims. Accordingly, the Court awards an attorney fee in the amount of $24,387 in favor of plaintiff and against the defendant.

IT IS SO ORDERED this 27 day of January, 1997.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SHERI L. BROWN, Plaintiff, vs. PIZZA HUT OF AMERICA, INC., Defendant.	)	No. CIV-95-1293-C (Filed Jun 20 1996)

JUDGMENT

This action came before the Court for a trial by jury. the issues were tried May 13-17, 1996, and the jury rendered its verdict in favor of defendant Pizza Hut of America, Inc. on plaintiff's Title VII claims for sexual harassment and retaliation, and in favor of plaintiff Sheri L. Brown on her claims for unpaid overtime compensation and retaliation in violation of the Fair Labor Standards Act. The jury awarded plaintiff damages in the following amounts: $34,394.17 in back pay and $15,605.83 in compensatory damages, including front pay on plaintiff's Fair Labor Standards Act retaliation claim; and, on plaintiff's Fair Labor Standards Act claim for unpaid overtime compensation, $2,500 in lost wages.

The issue of liquidated damages was submitted on briefs to the Court for consideration and, for the reasons set forth in the Court's memorandum opinion filed this same date, the Court finds plaintiff is entitled to an

award of $34,394.17 in liquidated damages on her retaliation claim, and $2,500 in liquidated damages on her claim for unpaid overtime compensation.

IT IS THEREFORE ORDERED AND ADJUDGED that judgment be, and hereby is entered in favor of defendant Pizza Hut of America, Inc. on plaintiff's Title VII claims for sexual harassment and retaliation and in favor of plaintiff Sheri L. Brown on her claims for retaliation and unpaid overtime compensation under the Fair Labor Standards Act, Judgment in favor of plaintiff and against defendant on the Fair Labor Standards Act claims is hereby entered in the amount of $89,394.17.

DATED this 20 day of June, 1996.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE
ENTERED IN JUDGMENT DOCKET
ON 6-20-96

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SHERI L. BROWN, Plaintiff,	)	No. CIV-95-1293-C
vs.	)	(Filed Jun 20 1996)
PIZZA HUT OF AMERICA, INC., Defendant.	)	

MEMORANDUM OPINION

The trial of this matter was conducted May 13-17, 1996, and concluded with a jury verdict in favor of plaintiff on her Fair Labor Standards Act ("FLSA") claims and in favor of defendant on plaintiff's Title VII discrimination and retaliation claims. On plaintiff's retaliation claim under the FLSA, the jury awarded plaintiff damages in the amount of $34,394.17 for back pay and $15,605.83 in compensatory damages, including front pay. Plaintiff was also awarded $2,500 in lost wages on her claim for unpaid overtime. The issue of liquidated damages is still at issue and, pursuant to the Court's June 3, 1996 Order, both plaintiff and defendant have submitted briefing on the issue. Plaintiff contends she is entitled to liquidated damages of $52,500, equal in amount to the jury's total award of damages in the verdict. Defendant, on the other hand, contends that although plaintiff is entitled to $2,500 in liquidated damages on her claim for unpaid overtime compensation, plaintiff should not be awarded any liquidated damages on her retaliation claim because the jury's

verdict effectuates the purpose of the FLSA without an award of liquidated damages.

The FLSA, 29 U.S.C. § 216(b), provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

It is within the Court's discretion to deny an award of liquidated damages or reduce the amount of such an award when the defendant employer shows its conduct was in good faith and that it had reasonable grounds for believing its conduct was not a violation of the FLSA. 29 U.S.C. § 260; *Dept. of Labor v. City of Sapulpa, Oklahoma*, 30 F.3d 1285, 1289 (10th Cir. 1994).

Defendant does not dispute that plaintiff is entitled to liquidated damages in the amount of $2,500 on her claim for unpaid overtime under the FLSA. However, defendant argues liquidated damages should not be awarded on plaintiff's retaliation claim. The Court disagrees and finds liquidated damages are warranted, although not in the amount plaintiff seeks.

Liquidated damages under the FLSA are intended to be compensatory, not punitive. *See, e.g., Renfro v. City of Emporia, Kansas,* 948 F.2d 1529 (10th Cir. 1991) ("The purpose for the award of liquidated damages is 'the reality that the retention of a workman's pay may well result in damages too obscure and difficult for estimate other than by liquidated damages.' [Citation omitted.]"), *cert. dismissed,* 503 U.S. 915 (1992). The jury has awarded plaintiff back pay in the amount of $34,394.17, as well as compensatory damages, including front pay, in the amount of $15,605.83. The Court finds plaintiff is entitled to and will be fully compensated by a liquidated damages award of $34,394.17. The jury has determined that $15,605.83 is the amount of damages that will compensate plaintiff for all losses other than back pay that she has suffered as a result of defendant's retaliatory conduct. To double that amount would frustrate the purpose of liquidated damages under the FLSA by allowing plaintiff a double recovery. *See, e.g., Avita v. Metropolitan Club of Chicago, Inc.,* 49 F.3d 1219, 1232 (7th Cir. 1995).

Judgment will therefore be entered in accordance with the jury's May 17, 1996 verdict and the foregoing.

IT IS SO ORDERED this 20 day of June, 1996.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET
ON 6-20-96

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SHERI L. BROWN,	)	
Plaintiff	)	
	)	No. CIV-95-1293-C
vs.	)	
PIZZA HUT OF AMERICA, INC.,	)	
	)	
Defendant	)	

VERDICT FORM

We the jury being duly empaneled and sworn upon our oaths, find as follows:

I.

(Complete each of Parts A through D)

(A) ON PLAINTIFF'S CLAIM FOR SEXUAL HARASSMENT, in favor of:

_ Plaintiff OR ✓ Defendant

(If you found for plaintiff, also complete Part IIA)

(B) ON PLAINTIFF'S TITLE VII RETALIATION CLAIM FOR COMPLAINING ABOUT SEXUAL HARASSMENT, in favor of:

_ Plaintiff OR ✓ Defendant

(If you found for plaintiff, also complete Part IIA)

(C) ON PLAINTIFF'S FAIR LABOR STANDARDS ACT RETALIATION CLAIM FOR COMPLAINING ABOUT UNPAID OVERTIME AND/OR LABOR VIOLATIONS, in favor of:

✓ Plaintiff OR _ Defendant

(If you found for plaintiff, also complete Part IIA)

(D) ON PLAINTIFF'S CLAIM FOR UNPAID OVERTIME IN VIOLATION OF THE FAIR LABOR STANDARDS ACT, in favor of:

✓ Plaintiff OR _ Defendant

(If you found for plaintiff, also complete Part IIB)

II.

DAMAGES

(A)

If you found in favor of plaintiff in parts I(A), (B), or (C) above, indicate below the damages to which plaintiff is entitled. If you found in favor of defendant on each of these three claims proceed to section II(B), below.

Back pay:	$34,394.17
Compensatory damages: (including front pay)	$15,605.83
Punitive damages: (only for Title VII claims)	$_____

(B)

If you found in favor of plaintiff in Part I(D) above, indicate below the amount of unpaid overtime wages to which plaintiff is entitled. If you found in favor of defendant on the Fair Labor Standard Act claim the presiding juror should now sign and date the verdict form.

Lost wages: $2,500.00

May 17, 1996 /s/ Illegible
Date Presiding Juror

APPENDIX F

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer then forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966 –

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date.

* * *

§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person –

* * *

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

* * *

§ 216. Penalties

* * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal

amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

* * *

§ 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.